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SUPREME COURT, U.S.

NO. 80-5456

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

EDWARD JOHN BULLWINKLE, III,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal for the
Second Appellate District of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRELIMINARY NOTE

Except for the issue with regard to his personal ability to invoke Fourth Amendment protection, appellant Edward John Bullwinkle's other issues on appeal are the same as those of his co-defendant and wife Lisa Bullwinkle. Therefore, in the interest of brevity and judicial economy, appellant will incorporate by reference the questions, argument, points and authorities and conclusions of law urged in the Jurisdictional Statement of Lisa Bullwinkle in their entirety as well as the Table of Authorities presented in that brief which is now on file with this Court as Docket #80-5263. In order to make

his own particular position clear to the Court and to simplify referral to Lisa Bullwinkle's brief, appellant herein will present his own statement of questions, parties below, opinion below, jurisdiction, constitutional and statutory provisions relied upon, statement of the case with regard to proceedings below and facts and argument with regard to his question I.

QUESTIONS PRESENTED

Appellant Edward John Bullwinkle III hereby appeals from a judgment of the Court of Appeal for the Second Appellate District of California, and presents the following questions to this Court:

I

Whether, as construed by previous opinions of this Court, a husband has standing to challenge the search and seizure of his wife's purse under the facts in this case as a violation of his Fourth Amendment rights.

II

Whether, as construed by the California Court of Appeal to mandate warrantless searches of closed containers of personal effects in all cases where a defendant is arrested for a felony, California Penal Code section 1412 and California Government Code section 26640 are facially, and, as applied in this case, unconstitutional in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

III

Whether, in the absence of exigent circumstances, a warrantless search of a closed container of personal effects in the exclusive custody and control of police

violates the Fourth and Fourteenth Amendments to the Constitution of the United States?

IV

Whether application of an "inevitable discovery" rule so as to allow findings of fact by a state Court of Appeal without evidentiary support, as were made in this case, deprives an appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and acts to deprive him of a full and fair hearing on his motion to suppress evidence?

PARTIES BELOW

In addition to Edward John Bullwinkle III and the People of the State of California, appellant's codefendant at trial, Lisa Bullwinkle, was a separately represented party to the decision below and has filed a notice of appeal to this Court. A Jurisdictional Statement was filed in this Court by Lisa Bullwinkle on August 19, 1980.

OPINIONS BELOW

There was no written opinion by the trial court: the oral arguments on the motion to suppress which is the subject of this appeal are reproduced from the record on appeal in the appendix of Lisa Bullwinkle's Jurisdictional Statement as A.A.,[1/] and the trial court's Minute Order of October 17, 1978, denying the motion is reproduced

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1. This record was reproduced to clarify the grounds on which the case was argued at trial, and is relevant to question IV and the timing of the presentation of question II in the state courts.

there as A. B. The opinion of the Court of Appeal is reported at 105 Cal.App.3d 82, ____P.2d_____, 164 Cal. Rptr. 163, and is reproduced in the Appendix of Lisa Bullwinkle's Jurisdictional Statement as A.F. The order of that court denying rehearing is reproduced in that Appendix as A.G. The order of the Supreme Court of California denying hearing and "depublication" is reported in the Bancroft-Whitney official advance sheets of California Official Reports in 1980 volume number 19, July 10, 1980, at page 11. It is reproduced in the Appendix of Lisa Bullwinkle's Jurisdictional Statement as A.H.

JURISDICTION

This is an appeal in a criminal case from the judgment and decision of the Court of Appeal for the Second Appellate District of California, filed on April 24, 1980, and from that Court's order denying rehearing filed on May 21, 1980. The Court of Appeal affirmed appellant's conviction of felony.

Review was sought in the Supreme Court of California which, by order of June 25, 1980, denied appellant's Petition for Hearing; except in capital cases where a sentence of death has been imposed, review of criminal convictions by the California Supreme Court is discretionary. The decision of the Court of Appeal became final, under local practice, on this date.

Notice of appeal to this Court was filed in the Court of Appeal on July 24, 1980, and a copy of that Notice was served on the California Supreme Court on the same date.

Copies of both Notices are reproduced in the Appendix to this Jurisdictional Statement as A.A. In the Court of Appeal and in the Supreme Court of California, appellant challenged the constitutionality of California Penal Code section 1412 and California Government Code section 26640, as they were construed by the Court of Appeal in this case. [Cf. Gooding v. Wilson, 405 U.S. 518 (1972).]

The appellate jurisdiction of this Court to determine the issue presented in Question II is thus conferred by 28 United States Code section 1257(2); see, Ybarra v. Illinois, 444 U.S. 85, ____, 62 L.Ed.2d 238, 245, 248-249 n. 11 (1979); compare, Richmond Newspapers, Inc. v. Virginia, ____U.S.____, fn. 4 (July 2, 1980); see also Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)

If probable jurisdiction is noted as to Question II, jurisdiction over the remaining questions is grounded on the doctrine of Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1921) as "other denial[s] of federal right[s] whether or not capable in [themselves] of being brought here by appeal." [Flournoy v. Wiener, 321 U.S. 253, 263 (1944); cf. Mishkin v. New York, 383 U.S. 502 (1966),]

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

* * * * *

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws."

CALIFORNIA STATUTORY PROVISIONS

California Penal Code section 1412:

"When money or other property is taken from a defendant, arrested upon a charge of public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police-office in such city or town."

California Government Code section 26640:

"The sheriff shall take charge of, safely keep, and keep a correct account of, all money and valuables found on each prisoner when delivered at the county jail. Except when otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

California Civil Code §5105

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interest and rights of husband and wife in community property."

California Civil Code §5110

"Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When single-family residence of a husband and wife is acquired

by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property."

California Civil Code §5125

"(a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community and personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property."

California Civil Code §5127

"Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however,

that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and the sole lease, contract, mortgage or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect."

The statutes under which the appellant and his wife were arrested (Cal.Pen. Code §476a) and those under which they were later additionally charged (Cal. Pen. Code §§459 and 496) are reproduced in the Appendix to Lisa Bullwinkle's Jurisdictional Statement as A.K. The statute under which their motion to suppress was made and preserved for appeal, California Penal Code §1538.5, is reproduced in that Appendix as A.L. The California statutes providing for the setting and posting of bail in felony cases (Cal. Pen. Code §§815a and 1269b) are reproduced in that same Appendix as A.M. California Rules of Court referred to in the Statement of the Case (Rules 24, 27, 29, 31 and 33) are reproduced in that Appendix as A.N.

STATEMENT OF THE CASE

A. Proceedings Below

Appellant Edward John Bullwinkle III and codefendant Lisa Bullwinkle were arrested in their home on a felony warrant charging them with violations of California Penal Code section 476a (writing checks with insufficient funds.)

After carrying Lisa's purse out of the apartment, one of the arresting officers conducted a cursory search of the purse and both defendants were then transported to a police station. Following a second warrantless station house search of the purse, the search which is the subject of the opinion below, a warrant to search their home was issued and executed; each defendant was subsequently charged in a single information with six additional counts of burglary (Cal. Pen. Code, §459) and receiving or concealing stolen property (Cal. Pen. Code, §496).

After denial of a joint motion - brought under California Penal Code section 1538.5 - to suppress the evidence found in the search of the purse and that seized under the resulting warrants, appellant's wife pled guilty to four counts of receiving stolen property and was immediately sentenced to a term of three years. Appellant proceeded to trial and was ultimately sentenced on pleas and guilty verdicts.

The warrantless searches of the purse had been justified in the trial court as "delayed-incident-to-arrest" searches, and Lisa's appeal to the California Court of Appeal briefed this issue, relying on United States v. Chadwick, 433 U.S. 1 (1979). The People responded in kind, relying on United States v. Edwards, 415 U.S. 800 (1974), and briefing was completed on July 9, 1979, with the filing of Lisa's reply brief.

On August 22, however, appellant Edward Bullwinkle, now on appeal himself with separate counsel, moved to consolidate his and Lisa's appeals and incorporated her brief in his own;[2] on August 24, the appeals were ordered consolidated. (Copy of Order reproduced in Appendix to Lisa Bullwinkle's Jurisdictional Statement as A.E.) On October 22, the People filed their brief in Edward's case, and for the first time argued the possibility that the purse could have been searched at booking, using this argument to buttress an assertion that, since there was to be a booking search, his wife had no expectation of privacy in the purse. Therefore, the People argued, the "delayed incident to arrest" search did not violate the Fourth Amendment.

In a November 5 letter[3] to the Court, however, after all briefing was completed in both cases, the People asserted an "accelerated booking search" theory as a separate and distinct ground on which to affirm the convictions. The People cited, for the first time, two cases to support this theory, cases which were available, but not cited, throughout this case. The co-appellants promptly moved to augment the

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2. Under California's "vicarious" standing rules, appellant Edward's standing to challenge the search of Lisa's purse was clear. [See People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955)]

3. A practice of "letter briefing" additional or supplemental points or authorities has developed in California, and such a letter is served, filed, and considered as if it were a supplemental brief.

record on appeal[4/] to demonstrate that the theory had not been raised below and, relying on California law that cases will not be decided on theories not raised at trial but "... thereafter invented for the consumption of reviewing courts..." [People v. Superior Court (Simon), 7 Cal.3d 186, 198, 496 P.2d 1205, 101 Cal.Rptr. 837 (1972)], argued that the Court of Appeal should not reach that issue. The motion to augment was granted on December 6, 1979.

In their first, June 20, brief, the People had argued that the initial search, which they characterized as the "key issue," was for weapons, and that that search permitted the police to see checkbooks "in plain view." The search for weapons, they asserted, was itself justified by Chimel v California, 395 U.S. 752 (1969). Between their June 20 filing, however, and their November 5 letter, caselaw developments seriously undermined this contention.

On the day the People filed their first brief, this Court decided Arkansas v. Sanders, 442 U.S. 753, (1979), reaffirming United States v. Chadwick, supra. On May 25 but not cited in their June 20 brief, the California Supreme Court had decided People v. Minjares, 24 Cal.3d 419, 591 P.2d 514, 153 Cal.Rptr. 224 (1979), and on August 22, this Court refused to stay the mandate in that case [California v. Minjares, _____U.S._____, 61 L.Ed.2d 825 (1979)]. Certiorari was denied in Minjares on October 7. [444 U.S. 887]

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4. The normal record on appeal in California does not include all of the trial filings (Cal. Rules of Court, rule 33a), and augmentation is necessary to put before the Court of Appeal matters of record not part of the normal record.

On July 12, 1979, the California Supreme Court allowed yet another Court of Appeal decision reversing on the authority of Chadwick to stand[5/] [People v. Pace, 92 Cal.App.3d 199, ____P.2d____, 154 Cal.Rptr. 811 (1979)] and on August 16, 1979, in People v. Dalton, 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr. 497 (1979), cert. den _____U.S.____, 63 L.Ed.2d 781 (Mar. 24, 1980), the California Supreme Court squarely held that probable cause to believe that a container held a weapon was not enough, when the container was in the custody of

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5. In addition to its discretionary power to review cases on the merits, the California Supreme Court has the power to "depublish" opinions selected by the deciding Court of Appeal for publication [Cal. Rules of Court, rule 976(c)]. Unpublished opinions may not be cited (Cal. Rules of Court, rule 977), and published opinions are considered to have the force of law [Auto Equity Sales, Inc., et al. v. Superior Court (Hessenflow), 57 Cal.2d 450, 369 P.2d 937, 20 Cal.Rptr. 321 (1962)] The California Supreme Court is generally considered to use this power of "selective publication" as a vehicle to direct the development of California law without the necessity of granting hearing, and the concomitant constitutional requirements of argument and written opinion [Cal.Const., art. VI, §3; art. VI, §14; People v. Brigham, 25 Cal.3d 283, 599 P.2d 100, 157 Cal.Rptr. 905 (1979)] See also Report of the Chief Justice's Advisory Committee for an Effective Publication Rule (June 1, 1979).

police and in the absence of exigencies, to justify a warrantless search. Finally, on June 12, in United States v. Cornejo, 598 F.2d 554 (9th Cir., 1979), the United States Court of Appeals for the Ninth Circuit had strongly hinted, on facts remarkably similar to those here, that the immediate search of a purse was barred under Chadwick.

Nevertheless, following the belated lead of the Attorney General, the state Court of Appeal found Chadwick "inapplicable," ignored the initial search "for weapons" and called the second search an "accelerated booking search." In the absence of any evidence that the purse would, in fact, have been searched at a later time, the Court of Appeal found a mandate for the search in California Penal Code section 1412 and California Government Code section 26640.

The co-appellants timely applied to the Court of Appeal for rehearing, itemizing the specific grounds asserted in Questions II and IV of this petition and also asserting that "The question [of the effect of United States v. Chadwick, supra, on booking searches]... is precisely the one framed by this Court; this Court thus should have first determined what effect Chadwick had on any search of this purse. [¶] By bowing to statutes however... this Court has sidestepped the substantial question of the effect of Chadwick on so-called 'booking' searches and has trampled on the Supremacy Clause." (Petn. for Rehg. of Lisa Bullwinkle.)

In the Petition for Rehearing, appellant also noted specific findings of fact assumed by the Court of Appeal

without evidentiary support, briefed the inapplicability of the statutes which contradicted the Court of Appeal's assertion that the "normal," and therefore inevitable, result of a felony arrest is booking.

In California, a reviewing court may grant rehearing on petition, or on its own motion, for any reason prior to the time the decision becomes final as to that court, i.e., within thirty days after the decision is filed. [Cal. Rules of Court, rule 24(a) and 27] A petition for rehearing in a court of appeal is a mandatory prerequisite to review by the Caifornia Supreme Court if "substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal..." [Cal. Rules of Court, rule 29(b)]

Rehearing was denied by the Court of Appeal on May 21, 1980, and appellant timely sought a hearing in the Supreme Court of California, again specifically setting forth in that petition the questions here presented. Appellant's petition for hearing in the California Supreme Court was denied by order of June 25, 1980, and the opinion of the Court of Appeal was allowed to remain published.[6/] Notice of Appeal to this Court was filed on July 24, 1980.

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6. See Footnote 5, ante at 9. The California Public Defender's Association and the Los Angeles County Public Defender, as amicus curiae, requested "depublication" of this decision. That request was denied. Chief Justice Bird and Associate Justice Mosk voted to grant a hearing which, in California, would have automatically "depublished" the Court of Appeal's opinion.

B. Statement of Facts

The motion to suppress had originally been made at the preliminary hearing in the municipal court. When the motion was renewed in the superior court after the defendants were bound over to that court, the motion was submitted on the transcript of the preliminary hearing and additional testimony adduced at hearing de novo. That evidence supported the following findings:

Three persons were in the Bullwinkle apartment when Detectives Alpert and Watson of the Santa Barbara Police Department arrived to serve the warrant and effectuate the arrest. The detectives were immediately admitted without incident, and both defendants identified themselves. Lisa was allowed to go to an upstairs bedroom alone, according to the detectives to change clothes; when Detective Watson heard a door close, he followed her upstairs and into one of two bedrooms. Edward followed Watson and was himself followed by Alpert, all four eventually coming to the bedroom. The third person was allowed to remain downstairs alone.

Lisa never changed clothing, though Edward did. As all were about to leave, Alpert asked Lisa whether she wanted to take her purse, indicating a closed leather bag on the floor. Lisa responded no, that bag only had a camera but then, according to the detectives, picked up another bag, her purse, from the floor. Watson immediately seized it and handed it to Alpert. It was never returned to Lisa's custody.

Lisa never said that she wanted to take the purse with her. She was never told it would be seized or searched, and in fact the closed purse remained closed while Alpert, carrying it, escorted the Bullwinkles back down to the living room and out of the apartment to the squad car.

Alpert testified that at the car he looked into the closed purse, for the first time, "for weapons." He saw none but said he noticed "numerous" checkbooks. He retained the purse, and after he and Watson had transported the Bullwinkles to the police station and had placed both of them in an interview room, Alpert decided to search the purse and immediately dumped the contents on his desk. He testified that this was not a booking search, nor an inventory search, but a search for evidence of the offenses charged and other similar offenses, for "checks or cancelled checks of the Bank of America and Security Pacific Bank or any other bank." Alpert then began calling banks he had identified from items in the purse to determine whether they had taken losses.7/

While Alpert had the contents of the purse spread on his desk, a third officer, Rogers, assigned to the burglary detail, came by. Looking at Edward Bullwinkle's

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7. In fact, Alpert testified, the officers had been looking for checkbooks ever since they had entered the apartment, and Lisa testified (and was corroborated by the third person in the apartment) that she went upstairs in response to the detective's orders to get her checkbooks and picked up her purse on Watson's order as well.

passport which had been in Lisa's purse, along with Lisa's own, Rogers thought he recognized the photo. Going to his file, he pulled out a composite sketch of a burglary suspect named Hunt who had used a military I.D. to sell stolen camers. Rogers also saw a picture of Bullwinkle in a military uniform among the items from the purse, and Alpert told him of a notebook containing what appeared to be names and serial numbers of cameras. Finally, Alpert said that they had seen "numerous" cameras at the scene. Rogers compared the notebook entries to the list of stolen equipment which he had and then, based on that information, obtained a telephonic search warrant for the Bullwinkle residence.

In that search, a substantial amount of stolen camera and electronic equipment was discovered, which led to the filing of the burglary and stolen property complaints herein.

No evidence was introduced to establish how, when, where, or under what conditions the Bullwinkles would have been "booked." No evidence was adduced directed at the general practice of the police department when "booking" an item such as a purse, or directed at the scope of such a search. No evidence as to the setting, or possibility of posting, immediate bail was introduced though California statutes mandate a setting of bail when a felony arrest warrant issues, and allows police to accept that bail (Cal. Pen. Code, §§815a and 1269b), or one listed on a bail schedule (Cal. Pen. Code, §1269b(e) and (f). No evidence

of the existance of independent "leads" to the evidence in the apartment was introduced, nor was there any evidence that Rogers would have, but for the evidence in the purse, been able, or even attempted, to secure a warrant.

California Penal Code section 7, subdivision 21 defines "booking" as"

> "... the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest."

California Government Code section 26640 only applies to sheriffs by its own terms, and California Penal Code section 1412 applies to receipts for property thought to have been stolen; both statutes were construed, however, to require searches by all police agencies of the personal property of all felony arrestees. No sanctions exist in Caifornia statutory or decisional law for failure to comply with this "mandate."

ARGUMENT

While appellant was allowed to assert standing to challenge the warrantless search and seizure of his wife's purse under California law, there is a serious question under the recent decisions of the Supreme Court as to his standing to bring this appeal because of his apparent status as a third party to the seizure. However, under the facts of this case, it could be found that he had a possessory interest in both the purse and its contents. It could also be found that he had a reasonable belief that her purse was a private and secure place in which he could safeguard a few personal possessions.

Once a personal stake in the Fourth Amendment question is found, the other issues are the same as those raised by appellant's wife, Lisa, in her Jurisdictional Statement.

The state court faced a claim that United States v. Chadwick, 433 U.S. 1 (1977) barred any search of this purse. Rather than addressing this issue the state court found a statutory mandate for a booking search of the purse, and then, reasoning backwards, found that since that invasion was to take place eventually, that any prior invasion was legal as well. Thus it did not matter that the actual search was not an inventory search; any prior invasion would be constitutional. Nor did it matter that in an actual booking search, the evidence would not have been discovered; since the accomplished

search was legal as an anticipatory invasion, any discoveries in that search were admissible.

The factual findings that the search would occur were based on statute; any lesser intrusion or other means to secure the property was barred by statute; and any factual defense to actual police procedures was rendered irrelevant by statute.

The original question, of the effect of Chadwick on the searches, was ignored.

I

Under Question I, the issue raised is whether a husband who lives in California has a Fourth Amendment privacy expectation with regard to his wife's purse which will allow him to challenge a search thereof at least in a case where the contents include some of his personal identification placed there for safekeeping. There are two theories under which Edward Bullwinkle can assert that the search was an unreasonable invasion of his Fourth Amendment rights; a theory based on the California law of community property and one based on a legitimate expectation of privacy with regard to his interest in the purse.

A. Community Property Theory

California is a community property state; in California, husband and wife are deemed to form a type of partnership when they marry and all of the property acquired during marriage as a result of the labor and skill of either belongs to both. [7 Witkin, Summary, Community Property §1 at p.5094] [For the convenience of the Court, the

sections cited from Witkin are reproduced in the Appendix to appellant's brief as section A.B.]

Under the statutory definition, community property includes all property acquired during marriage which does not come within the specified classes of separate property. [California Civil Code §5110] Because of the effect of §5110, a presumption arises that property acquired during marriage is community property. [7 Witkin, Summary §40 at p.5132] This presumption is fundamental, and "strong" evidence is necessary to overcome it. [7 Witkin, Summary, supra (Citations omitted)]

The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests. [California Civil Code §5105]

In 1973, the California Civil Code was amended to provide that, with certain exceptions not relevant here, either spouse has the management and control of the community real and personal property. [California Civil Code §§1525, 1527]

Lisa Bullwinkle never denied that the purse was her property; the facts in the case support the inference that it was. Under California law, the purse was presumptively community property in which her husband, the appellant, had a present, existing and equal interest and a right to share equally in its management and control should he choose to exercise it. Since he was a co-owner of the purse, Edward would have standing equal to Lisa's to protest a Fourth

Amendment violation in the search of the purse. [Rakas v. Illinois 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421, reh. den 439 U.S. 1122, 59 L.Ed.2d 83, 99 S.Ct. 1035 (1978)]

B. Legitimate Expectation of Privacy

The search of his wife's purse led to the disclosure of appellant's passport. The only reasonable deduction to be made from the fact that his wife was carrying his passport is that Edward had entrusted Lisa to carry it for safekeeping since it was not a document likely to be of value to her. Such an entrustment was reasonable and would seem to point to appellant's expectations that his possession would remain secure in her purse and free from unreasonable invasions of privacy there.

This Court recently decided the case of Rawlings v. Kentucky _____U.S.____ 65 L.Ed.2d 633, 100 S.Ct._____ (decided June 25, 1980). This Court held that the petitioner in Rawlings did not have a legitimate expectation of privacy when he put drugs which he owned into the purse of a female acquainantce. Appellant's case creates a set of facts which significantly distinguish his case from Rawlings yet raisesissues which have not yet been clearly decided by this Court regarding third-party interest in a search and seizure.

In contrast with Rawlings, the record in this case establishes

(1) Edward and Lisa Bullwinkle were husband and wife, not acquaintances who had known each other only a few days;

(2) The passport was not suddenly placed in the purse; the purse appears to have been the regular depository site for the passports of both spouses;

(3) Except with respect to his wife, appellant had a right to exert possessory dominion and control over the purse and could exclude others from it. [Jones v. United States 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960)] He achieved this power through the common social understandings that are recognized and permitted by society [Rakas v. Illinois, supra at p.143]as well as by his status as co-owner under the community property laws of the State of California cited in I A above.

(4) There was nothing about the entrustment of his passport to his wife's purse that would not support a reasonable inference that appellant was taking normal precautions to secure his property as opposed to the "precipitous bailment" in Rawlings. On the contrary, the nature of passports suggest that they are important and need to be kept secure, yet available. Except in unusual circumstances not present here, there is usually no need to secrete a passport. By giving

his passport to his wife to carry in her purse, appellant was assuring that it would be both secure and reasonably accessible to him. At the same time, it was unlikely that anyone save appellant and his wife would see inside the passport except those whom appellant wished since there would be no reason for Lisa Bullwinkle to display this particular item in her purse to anyone of her own volition.

(5) Finally, unlike Rawlings, there are no facts to indicate that appellant did not have a reasonble belief that his wife's purse was secure from governmental intrusion.

II

Appellant Edward Bullwinkle hereby adopts and incorporates by reference in support of Question II of his Jurisdictional Statement the Argument and the supporting authorities cited in the Argument, Question I of the Jurisdictional Statement by appellant Lisa Bullwinkle on file herein. [Rule 15(3)]

III

Appellant Edward Bullwinkle hereby adopts and incorporates by reference in support of Question III of his Jurisdicitonal Statement the Argument and the supporting authorities cited in the Argument, Question II of the Jurisdictional Statement by appellant Lisa Bullwinkle on file herein. [Rule 15(3)]

IV

Appellant Edward Bullwinkle hereby adopts and incorporates by reference in support of Question IV of his Jurisdictional Statement the Argument and the supporting authorities cited in the Argument, Question III of the Jurisdictional Statement by appellant Lisa Bullwinkle on file herein. [Rule 15(3)]

CONCLUSION

The position of appellant in this case raises issues under Jones, Rakas and Rawlings regarding his ability to assert a violation of his personal Fourth Amendment rights. It would appear that, under the guidelines provided by those cases, appellant can assert a personal injury

The actual holdings of this case, that personal luggage of an arrestee in the exclusive, continuous, and unthreatened control of the police may be searched, is in conflict with Chadwick. The holding that an inventory search of that property is required in all felony arrests, is at odds with the rationale of Opperman. Application of the inventory rule where the search is not in fact an inventory search codifies an approval of the "pretext" search condemned in Opperman, and fails to come to grips with the conflict thus created with Chadwick. If the stationhouse search cannot be justified as an anticipatory inventory, then the critical question becomes that reserved in Sanders. For all these reasons, and because of pervasive effects of this holding, the questions presented are substantial. Their resolution in the court below was

based on state statues timely and properly challeneged as facially unconstitutional. This Court should therefore note probable jurisdiction and set this case on its argument calendar; appellant respectfully so petitions.

DATED: September 24, 1980

Respectfully submitted,

Michael J. Treman

Michael J. Treman
Attorney at Law

Member of the Bar of the
Supreme Court, Counsel
for Appellant

2d Crim. 34931

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, vs. EDWARD JOHN BULLWINKLE III, Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Superior Ct. Number 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, vs. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Superior Ct. Number 122272)

NOTICE OF APPEAL

Appellant EDWARD JOHN BULLWINKLE III through his undersigned counsel, hereby gives notice pursuant to Rule 10 of the Rules of the Supreme Court of the United States that he appeals to the Supreme Court of the United States from the decision of this court in this case filed on April 24, 1980, and from its order

Exhibit A

denying rehearing filed on May 21, 1980, which became final as to this court on May 24, 1980. Appellant's petition for hearing by the Supreme Court of California was denied by post card order of that Court dated June 25, 1980.

The jurisdiction of the Supreme Court of the United States to hear the questions presented herein by appeal is conferred by 28 United States Code section 1257(2); see also Prudential Ins. Co. v. Cheek (1921) 259 U.S. 530; Flournoy v. Wiener (1944) 321 U.S. 253; Mishkin v. New York (1966) 383 U.S. 502; jurisdiction by certiorari will be separately asserted and is conferred by 28 United States Code section 2357(3) and 2103.

At Santa Barbara, California, this 24th day of July, 1980.

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Attorney for Appellant
Edward John Bullwinkle III

Exhibit A

2d Crim. 34931

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, vs. EDWARD JOHN BULLWINKLE III, Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Superior Ct. Number 122272) (CONSOLIDATED ON APPEAL)
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At Santa Barbara, California, this 24th day of July, 1980.

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Attorney for Appellant
Edward John Bullwinkle III

Exhibit A

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A. [§125] Nature and Purpose of Legislation, 5219

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C. [§127] Declaration of Homestead, 5221

INTRODUCTION

A. [§1] Community Property System.

(1) *Origin and Theory.* The community property system originated on the Continent, came to Mexico from Spain, and became California law through the treaty of 1848 (see *Real Property*, §3). The general theory is that the husband and wife form a sort of partnership, and that property acquired during the marriage by the labor or skill of either belongs to both. (See generally 15 Am.Jur.2d, Community Property §1 et seq.)

(2) *Law of Other Community Property States.* The system is in force in eight states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington. Some years ago Oregon, Oklahoma, Michigan, Pennsylvania, Nebraska and the territory of Hawaii adopted "community property systems" for the purpose of gaining the income tax advantages enjoyed by husband and wife in community property states. The Pennsylvania act was declared unconstitutional by the Pennsylvania Supreme Court (see 21 So. Cal. L. Rev. 383), and, after the enactment of the Revenue Act of 1948, the other statutes were repealed. Today only the original states retain the community property system. (For discussions of the law of other states, see 24 So. Cal. L. Rev. 42; 25 So. Cal. L. Rev. 149; 8 Cal. Western L. Rev. 117 [Texas law]; 1949 A.S. 745; 1950 A.S. 756; and see 12 Santa Clara Lawyer 638 [review of de Funiak and Vaughn, Principles of Community Property, 2d ed.].)

The California law, however, is distinct in many important respects, and caution must be exercised in the use of authorities from those states. (See *Grolemund v. Cafferata* (1941) 17 C.2d 679, 688, 111

Exhibit B

P.2d 641 [rejecting Washington authority on liability of community property for debts]; *Commissioner v. Harmon* (1944) 323 U.S. 44, 65 S.Ct. 103, 89 L.Ed. 60 [contrasting former Oklahoma *optional* community property law].)

(3) *Dower and Curtesy Abolished.* The community property system supersedes these common law interests: "No estate is allowed the husband as tenant by curtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband." (C.C. 5129.)

(4) *Other Forms of Joint Ownership.* The community property system does not preclude other forms of ownership by a husband and wife, such as joint tenancy, tenancy in common, or partnership. (See infra, §45 et seq.; *Real Property*, §202.)

B. [§2] Development of Modern California Law.

(1) *Early Law.* The California community property law has been frequently changed by amendments to the Civil Code, the general tendency of which has been to *enlarge the rights of the wife.* However, in each instance in which the rights of the wife were increased and those of the husband limited, it was held that the statute could not be *retroactively applied* so as to affect vested rights of the husband in property previously acquired. (See *McKay v. Lauriston* (1928) 204 C. 557, 269 P. 519; *Roberts v. Wehmeyer* (1923) 191 C. 601, 218 P. 22; *Stewart v. Stewart* (1928) 204 C. 547, 269 P. 439; *Boyd v. Oser* (1944) 23 C.2d 613, 145 P.2d 312; cf. *Ottinger v. Ottinger* (1956) 141 C.A.2d 220, 225, 296 P.2d 347, infra, §10 [amendment favoring *husband* could not retroactively divest rights of *wife*]; *Jacquemart v. Jacquemart* (1954) 125 C.A.2d 122, 125, 269 P.2d 951 [same]; and see generally 174 A.L.R. 235.) It is sometimes necessary, therefore, to consider the *date of the acquisition of the community property* in order to determine the rights of the parties therein.

The foregoing rule, requiring prospective application of the changes affecting interests in community property, has been the subject of frequent discussion and considerable adverse comment by law writers. (See 27 Cal. L. Rev. 49; 32 Cal. L. Rev. 187; 33 Cal. L. Rev. 476; 42 Cal. L. Rev. 377; 17 So. Cal. L. Rev. 399; 51 Cal. L. Rev. 163; 18 Stanf. L. Rev. 514; 39 So. Cal. L. Rev. 266; 57 Cal. L. Rev. 577; and see *Addison v. Addison* (1965) 62 C.2d 558, 43 C.R. 97, 399 P.2d 897, infra, §125.)

(2) *Family Law Act.* The Family Law Act (see *Husband and Wife*, §15) recodified the community property statutes in new Title

part after marriage with community funds; i.e., normally the proceeds will be apportioned in the ratio that the amount of community funds used bears to the amount of separate funds used. (See *Gettman v. Los Angeles Dept. of W. & P.* (1948) 87 C.A.2d 862, 865, 197 P.2d 317 [rule applied to retirement benefits]; cf. *Gelfand v. Gelfand* (1934) 136 C.A. 448, 456, 29 P.2d 271 [suggesting reimbursement of payments].)

C. Presumptions.

1. General Presumption of Community Property.

(a) [§40] Nature and Effect.

Under the statutory definition of community property as including all property acquired after marriage which does not come within the specified classes of separate property (C.C. 5110, supra, §3), a presumption arises that property acquired during the marriage is community. "This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation." (*Wilson v. Wilson* (1946) 76 C.A.2d 119, 126, 172 P.2d 568.) Accordingly it is said that "strong" evidence is necessary to overcome it. (See generally *Estate of Jolly* (1925) 196 C. 547, 553, 238 P. 353; *Simonton v. Los Angeles T. & S. Bank* (1928) 205 C. 252, 258, 270 P. 672; *Hurley v. Hibernia Sav. & Loan Soc.* (1932) 126 C.A. 314, 319, 14 P.2d 574; *Estate of Walsh* (1944) 66 C.A.2d 704, 709, 152 P.2d 750; *Estate of Kane* (1947) 80 C.A.2d 256, 266, 181 P.2d 751; *Pope v. Pope* (1951) 102 C.A.2d 353, 366, 227 P.2d 867; *Estate of Brenneman* (1958) 157 C.A.2d 474, 480, 321 P.2d 86; 1 So. Cal. L. Rev. 298; 25 So. Cal. L. Rev. 149; cf. *Estate of Duncan* (1937) 9 C.2d 207, 217, 70 P.2d 174 ["This presumption has greater force in cases where the marriage has been a long-continued relation than in cases where the marriage was entered into shortly before the acquisition of the property"]; *Mason v. Mason* (1960) 186 C.A.2d 209, 213, 8 C.R. 784, supra, §34.)

Though correctly described as a fundamental part of the system, this presumption is subject to several statutory exceptions. (See infra, §41.) And even where the presumption applies it is rebuttable, and the trial judge's determination of the sufficiency of the rebutting evidence will usually be upheld. (See *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 128, 264 P.2d 626; *Morris v. Berman* (1958) 159 C.A.2d 770, 792, 324 P.2d 601; *Estate of Casella* (1967) 256 C.A.2d

Exhibit B

312, 326, 64 C.R. 259 [land bought by husband with proceeds from sale of his separate property; trial judge could believe that parties did not understand significance of accountant's method of preparing income tax return].)

(b) [§41] Exceptions.

(1) *Death 4 Years After Dissolution.* Normally in a dissolution proceeding the community property is ascertained and divided, either by a court award or by approval of a property settlement agreement. (See infra, §92 et seq.; *Husband and Wife*, §189 et seq.) If, because of failure to plead or other reason, the community property rights are not determined, the interests of the spouses remain unaffected and they become tenants in common of such property. (See infra, §107.) On the death of one of the spouses thereafter, the surviving spouse may claim certain property as community, or a claim may later be made under Prob.C. 228 (succession to property which was community property of decedent and predeceased spouse; see *Wills and Probate*, §74). In the subsequent proceeding, proof that the property was acquired during the marriage would bring the presumption in favor of community property into operation (supra, §40).

In 1955, the general statute on disputable presumptions was amended to add a presumption, now stated in C.C. 5111 as follows: The presumption of community property "does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years prior to such death." (On uncertainty in language of original statute, see 43 Cal. L. Rev. 687.)

(2) *Taxation.* The presumption does not apply against the state under the Inheritance Tax Act or the Gift Tax Act. (Rev.C. 13556, 15306; see *Taxation*, §§220, 252.)

(3) *Transfer to Married Woman: Former Law.* Prior to the effective date of the 1973 amendment (January 1, 1975) the presumption does not apply to property transferred to a married woman in writing. (C.C. 5110, infra, §43 et seq.)

(c) [§42] Distinction: Family Expense Presumption.

(1) *Theory of Presumption.* The cases developed a new presumption that *the expenses of the family are paid from community funds.* "Where the husband, charged with the support of a family, has income

Exhibit B

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NO. 80-5456

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

EDWARD JOHN BULLWINKLE, III,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal for
the Second Appellate District of California

SUPPLEMENTAL APPENDIX

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* Appendix Exhibits A (Notices of Appeal to the Supreme Court of the United States) and B were attached to the Jurisdictional Statement mailed September 25, 1980.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

DATE: October 17, 1978 TIME: 2:00 P.M.

Assemble BRUCE W. DODDS — JUDGE
Mary Lou Armstrong — Deputy County Clerk
- - - — Deputy Sheriff
- - - — Court Reporter
Dept. 1

Present:

THE PEOPLE OF THE STATE OF CALIFORNIA — District Attorney

No. 122272 vs.

EDWARD JOHN BULLWINKLE, III, and
LISA C. BULLWINKLE,
Defendants.

P
K
V
CC
CA
AC
J
SR
AP

NATURE OF PROCEEDINGS: RULING ON SUBMISSION

The Court having taken the motions pursuant to Penal Code Sections 995 and 1538.5 under submission after hearing evidence and arguments, now rules that both motions as to both defendants are denied.

COPIES TO: District Attorney
M. Treman, Attorney at Law
J. Crowder, Deputy Public Defender
(Served in open court on October 18, 1978)

HOWARD C. MENZEL, County Clerk

By Mary Lou Armstrong
Deputy Clerk

Entered 10-17-78

CL-13 (Rev. 6/76)

CRIMINAL MINUTES

EXHIBIT "C" -1-

00514

ORDER

The Court having read and considered the motion of appellant EDWARD JOHN BULLWINKLE, III to consolidate case number 2nd Crim. 34931 with case number 2nd Crim 33763; the points and authorities and the declaration in support thereof; ~~any opposition thereto~~; and ~~the time for filing opposition having expired~~, there being good cause:

IT IS HEREBY ORDERED THAT: The case entitled PEOPLE vs EDWARD JOHN BULLWINKLE III, case number 2nd Crim 34931 is hereby consolidated with the case entitled PEOPLE vs LISA BULLWINKLE, case number 2nd. Crim. 33763, and

IT IS FURTHER ORDERED THAT any further papers filed in either case should contain both captions and should reflect that the cases are consolidated.

DATED: 5/24/79

PRESIDING JUSTICE
SECOND APPELLATE DISTRICT

CLERK

Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LISA BULLWINKLE, Defendant and Appellant.	2d Crim. No. 33763 (Sta. Barbara Sup.Ct. No. 122272) (CONSOLIDATED ON APPEAL)
THE PEOPLE, Plaintiff and Respondent, v. EDWARD JOHN BULLWINKLE, JR., Defendant and Appellant.	2d Crim. No. 34931 (Sta. Barbara Sup.Ct. No. 122272)

COURT OF APPEAL-SECOND DIST.
FILED
APR 24 1980
CLA[illegible]SBINS, JR. Clerk
Deputy Clerk

APPEALS from judgments of the Superior Court of Santa Barbara County. Bruce W. Dodds and John T. Rickard, Judges. Affirmed with directions.

Quin Denvir, State Public Defender, Charles M. Sevilla, Chief Assistant State Public Defender, Robert P. App, Deputy State Public Defender; and Michael J. Treman, under appointment by the Court of Appeal, for Defendants and Appellants.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Criminal Division S. Clark Moore, Assistant Attorney General, John R. Gorey and Sandy R. Kriegler, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Lisa and Edward Bullwinkle were charged jointly and individually on a total of 15 counts of burglary, receiving stolen property, and writing checks with insufficient funds. (Pen. Code, §§ 459, 496, 476a.) Following denial of their motions under Penal Code sections 995 and 1538.5, Lisa pled guilty to four counts of receiving stolen property and was sentenced to state prison. Edward pled guilty to two counts of receiving stolen property and by jury trial was convicted of two additional counts of receiving stolen property and one count of burglary, and was sentenced to state prison.

The primary issue on both appeals is the legality of a search of Lisa's purse after she was arrested for writing checks with insufficient funds, which search led to the obtaining of the evidence of stolen property involved in both appellants' convictions. Edward separately raises issues as to his motion for new trial and his sentence.

The motion under Penal Code section 1538.5 was based on the transcript of the preliminary hearing and additional testimony. On appeal we must view the evidence at the preliminary hearing and section 1538.5 hearing in the light most favorable to the trial court's ruling, resolving all conflicts in the evidence in favor of the judgment. (People v. Lawler, 9 Cal.3d 156, 160; People v. West, 3 Cal.3d 595, 602.) Stated in this light, the facts surrounding the search are as follows: On March 3, 1978, Santa Barbara Police Officers Watson and Alpert arrested appellants at their home on an arrest warrant for writing checks with insufficient funds. Appellants were arrested in the living room. Lisa desired to go upstairs to the bedroom to get some clothing to take with her to jail, and was permitted to do so. Upon being asked whether she wished to take her purse, she reached down to the floor and picked it up. Then she handed it to Officer Watson or he took it from her. Watson handed the purse to Alpert.

Officer Alpert checked the purse for weapons and happened to observe checkbooks inside, but did not otherwise search it at this time. The officers kept the purse in their possession while appellants were transported to the police department.

After arriving at the police department, Officer Alpert emptied the purse onto his desk and searched through the contents. He was looking for evidence relevant to the check writing charges for which appellants were arrested, such as checks, checkbooks, and identification papers.

At that moment, Officer Rogers of the burglary detail passed by, and upon observing a photograph of Edward among the contents of the purse, recognized Edward as resembling an artist's composite drawing of a suspect he was investigating for burglary of a photographic equipment store, as well as other crimes. He commented on this to Officer Alpert, who then pointed out that the purse contained papers with lists of cameras and their serial numbers. Upon

verifying that the listed items were among the property stolen from the photographic equipment store and comparing the artist's composite drawing of the burglary suspect, Officer Rogers obtained a search warrant for the search of appellants' house, which resulted in the seizure of numerous items of stolen property leading to the convictions in the instant case.

SEARCH OF PURSE

Appellants contend that the search of the contents of Lisa's purse at the police station was unlawful because it was conducted without a warrant. Appellants point out that the police took custody of the purse at appellants' house, and they argue that once the purse had been reduced to the exclusive control of the police there was no danger that Lisa could destroy evidence in it or seize a weapon from it and that therefore no justification existed for dispensing with the requirement of a warrant. They

cite such cases as United States v. Chadwick, 433 U.S. 1, 15; Arkansas v. Sanders, ___ U.S. ___; 61 L.Ed.2d 235, 245; People v. Minjares, 24 Cal.3d 410, 420-423; People v. Dalton, 24 Cal.3d 850, 855-856; and People v. Pace, 92 Cal.App.3d 199, 202-204.

These cases are inapplicable here, because Lisa was under arrest for a felony and her purse would properly have been subject to search in the course of booking her into the jail. It has long been the rule that the police may search the person and the effects of a prisoner who is to be booked into jail, in order to prevent the introduction of contraband or weapons into the jail and in order to account for and safeguard the property taken from the prisoner. (United States v. Edwards, 415 U.S. 800, 804-805 & fn. 6, 807; People v. Ross, 67 Cal.2d 64, 70 [reversed on other grounds sub nom. Ross v. California, 391 U.S. 470]; People v. Maher, 17 Cal.3d 196, 200-201; People v. Rogers, 241 Cal.App.2d 384, 389; People v. Superior Court (Murray), 30 Cal.App.3d 257, 263; People v. Balassy, 30 Cal.App.3d 614, 623; People v. Gilliam, 41 Cal.App.3d 181, 189; People v. Remiro, 89 Cal.App.3d 809, 835; Pen. Code, § 1412; Gov. Code, § 26640.)

Where it is shown that a suspect would have been jailed and thus subject to a booking search, the fact that a thorough search of the booking type occurs prior to the actual booking process does not render the search illegal, since no additional or greater intrusion on the privacy of the suspect is involved. (People v. Barajas, 81 Cal. App.3d 999, 1008-1009; People v. Flores, 100 Cal. App.3d 221, 229-230; see People v. Superior Court (Simon), 7 Cal.3d 186, 208-209; People v. Longwill, 14 Cal.3d 943, 948; People v. Brown, 88 Cal.App.3d 283, 293.)

In cases where the police have available some statutory alternative to jailing the suspect, as with certain Vehicle Code violations, misdemeanors (see Pen. Code, § 853.6), or intoxication (see Pen. Code, § 849, subd. (b)(2), (3)), the validity of a so-called "accelerated" booking search will depend upon a factual showing by the People that the suspect would have been subjected to the booking process. (People v. Barajas, supra, 81 Cal.App.3d at p. 1009.)

But that is not the case in felony arrests, where jailing is the normal result. (Id., at pp. 1009-1010; see also People v. Flores, supra, at p. 230.) Here, Lisa was under arrest for writing checks with insufficient funds, a felony,[1/] and no further showing that she would have been subjected to booking is necessary. (People v. Barajas, supra.)

Appellants contend that assuming Lisa would have been jailed, a booking search should be limited to a search of her person and items worn on her person, and should not extend to her purse, because theoretically the purse could have been kept out of jail facilities without being opened. There is no merit to this argument. Booking searches have traditionally been thought to extend to a purse (see People v. Rhodes, 23 Cal.App.3d 257, 258; People v. Blatt, 23 Cal.App.3d 148, 152; People v. Brown, supra, 88 Cal.App.3d 283, 293), as well as a wallet (see People v. Balassy, supra, 30 Cal.App.3d 614, 623; People

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1. Violation of Penal Code section 476a is punishable alternatively as a misdemeanor or a felony. So far as the police were concerned, it was a felony, since none of the events which could render it a misdemeanor was subject to police discretion. (Pen. Code, § 18, subd. (b).)

v. Tennessee, 4 Cal.App.3d 788, 792). Appellants' argument overlooks the fact that the purposes of a booking search include not only to prevent contraband and weapons from entering the jail, but also to account for the valuables and other property of the prisoner, which the police are mandated by statute to do. (Pen. Code, § 1412; Gov. Code, § 26640.)[2/] Such a search is not like the inventory of the contents of an automobile disapproved in Mozzetti v. Superior Court, 4 Cal.3d 699, 708-710. The duty to account for

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2. Penal Code section 1412 provides:

"When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. When such property is taken by a police-officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police-office in such city or town."

Government Code section 26640 provides:

"The sheriff shall take charge of, safely keep, and keep a correct account of, all money and valuables found on each prisoner when delivered at the county jail. Except when otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

the valuables and property taken from a prisoner upon jailing is specifically mandated by statute, and appears to be greater than the duty of slight care or ordinary care which Mozzetti held was owed toward impounded automobiles. A purse is precisely the place where the money and valuables contemplated by the statutes would normally be found. Viewing the facts most favorably to the judgment, Lisa, knowing that she was about to be taken to jail, chose to take her purse. She had no reasonable expectation that she could take it to jail without its contents being examined. Moreover, purses and wallets are entirely different from automobiles. The contents of automobiles "may be readily and adequately protected by locking the vehicle." (Mozzetti v. Superior Court, supra, 4 Cal.3d at p. 709.) The contents of purses and wallets, on the other hand, are easily susceptible to theft since purses and wallets cannot normally be locked. (People v. Morton, 21 Cal.App.3d 172, 175, distinguishing Mozzetti.) While it would be difficult to steal the contents of a locked automobile, the contents of a purse could easily be taken or lost, even

en route from the booking area to a property room or locker. The inventorying of a prisoner's valuables and effects has always been thought one of the proper purposes of a booking search, both before and after Mozzetti. (People v. Maher, supra, 17 Cal.3d 196, 200-201.) Appellants' argument that the governmental interests in preserving the contents of the purse can be satisfied by placing the purse unopened into some kind of property room or property locker is not persuasive.

Appellants argue that the People's accelerated booking-search theory was not articulated in the trial court and may not be urged for the first time on appeal, citing People v. Superior Court (Simons), supra, 7 Cal.3d 186, 198; People v. Miller, 7 Cal.3d 219, 227; Mestas v. Superior Court, 7 Cal.3d 537, 542, and Agar v. Superior Court, 21 Cal.App.3d 24, 28-29. However, in this case appellants are not prejudiced by the People's failure to articulate this theory below. The purpose of the rule preventing the People from relying upon a new theory on appeal in the above cases is to give the defendant a

fair opportunity to cross-examine prosecution witnesses and to adduce evidence of his own to rebut the new theory. (People v. Sirhan, 7 Cal.3d 710, 736-737.) In the cases cited by appellants the People had failed to establish in the trial court that as a factual matter the police officer entertained a belief that a crime other than the one for which the defendant was arrested had also been committed.

Here, on the other hand, the validity of an accelerated booking search does not depend upon facts which might have been contested had the matter been raised earlier. Since Lisa's arrest was for a felony, no factual showing that she actually would have been booked is involved. (People v. Barajas, supra, 81 Cal.App.3d 999, 1009-1010.) Unlike the cases cited by appellants, the validity of an accelerated booking search does not require the police officer's subjective belief that he is actually conducting a booking search, nor would it be negatived by the officer's express concession, as in this case, that he was not conducting a booking search. The theory is that the privacy of the prisoner and her effects would have been invaded anyway, and that therefore no greater intrusion on that privacy occurs when the search is conducted

other than during the booking process. Finally, the validity of a booking search of this type should not hinge upon distinctions as to the particular facilities for prisoner-property storage at particular police stations or jails. As we have discussed, the statutory duties imposed upon the police to account for and safeguard a prisoner's property, and the easy susceptibility of a purse to theft of its contents, justify inventorying its contents even in stations where individual property lockers might be available.[3/] Thus we see no way in which appellants were prejudiced by the People's raising this argument on appeal. (People v. Sirhan, supra, 7 Cal.3d at p. 737.) In these circumstances, where the record shows the search was lawful, it is our duty to uphold

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3. We are aware of the recent decision in People v. Smith (Mar. 27, 1980, 1 Crim. 19411) ____ Cal.App.3d ____, but find it distinguishable. There, after the defendant's purse had been subjected to a booking search and then placed in a property locker, an officer removed the purse and conducted a second search the following day, which the People sought to uphold on a booking search theory. The court held that once a booking search had been conducted and the property placed in storage, a warrant (or additional exception to the warrant requirement) was necessary for another search. The court expressly declined to decide whether the initial booking search required a warrant.

the trial court's ruling, even if upon a theory not articulated below. (See Cal. Const., art. VI, § 13; Pen. Code, §§ 1258, 1404; Code Civ. Proc., § 475.)[4/]

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4. Appellants also contend the search was illegal on the ground that the original arrest was unlawful due to inaccuracies in the affidavit for the arrest warrants. Officer Watson concluded in his affidavit that appellants had "issued numerous checks that were returned 'NSF' or 'Account Closed.'" Appellants argue this was technically incorrect because the checks were not physically stamped "NSF" or "Account Closed" nor physically returned to the stores who were the named payees. This was because appellants had check guarantee cards from the bank. The check guarantee cards were not a credit device under which the bank extended credit to appellants for overdrafts in the accounts; rather the bank had an agreement with the merchants involved, that the bank would honor checks presented with the check guarantee cards. Therefore the bank was going to have to honor the checks in favor of the merchants. The bank, rather than the merchants, would be the ultimate victim. The facts nevertheless showed that appellants were writing checks with insufficient funds in their accounts to cover them. As the trial court found, the officer's language in the affidavit may have been technically imprecise, but this was not the type of error which requires quashing the warrant or excising information from it. Interpreted in a commonsense, rather than a hypertechnical, fashion, the affidavit supported issuance of the arrest warrant. (United States v. Ventresca, 380 U.S. 102, 108-109; People v. Mesa, 14 Cal.3d 466, 469.)

MOTION FOR NEW TRIAL

Edward contends that the trial court erred in denying his motion for new trial based upon misconduct of a juror.

Appellants' friend Brian Burch was present at appellants' apartment when the police arrested appellants. He was called as a witness by the prosecution, but generally denied any recollection of having observed expensive photographic and electronic equipment in the apartment. In response to a question about whether appellants had a motor vehicle, Burch commented that he did not know, but that he, Burch, drove when he and appellants would go swimming at the Coral Casino, where appellants were members.

On Edward's motion for new trial it was proved by the affidavits of four jurors that one juror, in violation of her duties, went to the Coral Casino and was informed that appellants were not members but that a relative of appellants was.

SENTENCE

Edward was sentenced on one count of burglary and was given consecutive sentences on the remaining four counts of receiving stolen property. He contends that since the stolen property was all discovered at his apartment on the same date, he cannot be subjected to multiple punishment on the various counts of receiving stolen property, citing People v. Lyons, 50 Cal.2d 245, 275.

Under Lyons, if the evidence shows that goods stolen from different sources were received on a single occasion, there is but one offense of receiving stolen property. However, this rule is inapplicable when there is evidence from which the jury might infer that the goods were not received at the same time or in the same transaction. (People v. Roberts, 182 Cal.App.2d 431, 437.) In this case, the record reasonably supports the inference that appellant received the various stolen goods at

different times and in different transactions. The burglaries during which the goods were stolen occurred at widely separated times. The Browne burglary occurred in May 1975. The Circon burglary occurred around December 1, 1975. The National Photo burglary involved in count VI occurred January 10, 1976. The B & K Industries burglary was in January 1978.

CREDIT ON SENTENCES

Both appellants contend they are entitled to additional credit on their sentences for good time/work time. Under the recent California Supreme Court decision in People v. Sage, 26 Cal.3d 498, 507, appellants are entitled to such conduct credit if earned.

The judgments are affirmed and the causes are remanded to the trial court for determination of the conduct credit to which appellants are entitled.

CERTIFIED FOR PUBLICATION.

ASHBY, J.

We concur:

STEPHENS, Acting P. J.

HASTINGS, J.

Los Angeles, Cal. MAY 21 1980 19____

TITLE { Geo Ballowitz } No. 24931

Adverse Client

PETITION FOR REHEARING DENIED.

MAY 22 1980

CLAY ROBBINS, Clerk

By ____

EXHIBIT "F"

ORDER DUE
July 23, 1980

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2d District, Division 5, Crim. No. 34931
33763

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE
v.
BULLWINKLE

PEOPLE
v.
BULLWINKLE, JR.

SUPREME COURT
FILED
JUN 25 1980
LAURENCE P. GILL, Clerk
Deputy

Appellants' petition for hearing DENIED.

The requests for an order directing non-publication of the opinion in the above entitled cause is denied.

Bird, C.J., and Mosk, J., are of the opinion that the petition for hearing should be granted.

Bird
Chief Justice

EXHIBIT "G"

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

NO. 80-5456

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

EDWARD JOHN BULLWINKLE III,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT
OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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ISSUES PRESENTED

I

Whether, as construed by previous opinions of this Court, a husband has standing to challenge the search and seizure of his wife's purse under the facts in this case as a violation of his Fourth Amendment rights.

II

Whether, as construed by the California Court of Appeal to mandate warrantless searches of closed containers of personal effects in all cases where a defendant is arrested for a felony, California Penal Code section 1412 and California Government Code section 26640 are facially, and, as applied in this case, unconstitutional in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

III

Whether, in the absence of exigent circumstances, a warrantless search of a closed container of personal effects in the exclusive custody and control of police violates the Fourth and Fourteenth Amendments to the Constitution of the United States?

IV

Whether application of an "inevitable discovery" rule so as to allow findings of fact by a state Court of Appeal without evidentiary support, as were made in this case, deprives an appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and acts to deprive him of a full and fair hearing on his motion to suppress evidence?

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NO. 80-5456

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1980

EDWARD JOHN BULLWINKLE III,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Court of Appeal for the Second Appellate District of California on the ground that the issues raised in the appeal are so unsubstantial as not to require any further argument.

I

THE NATURE OF THE CASE

A. Proceedings Below

Appellant Edward Bullwinkle was charged in an information filed by the District Attorney of Santa Barbara County with five counts of burglary, in violation of California Penal Code section 459, six counts of receiving stolen property, in violation of California Penal Code section 496, and two counts of issuing a check without sufficient funds, in violation of California Penal Code section 476(a). Following appellant's plea of not guilty, he unsuccessfully moved to suppress evidence seized from his wife's purse and in their apartment pursuant to California Penal Code section 1538.5.

After denial of appellant's motion to suppress the evidence, he

pleaded guilty to the two counts of receiving stolen property and was convicted by jury of three counts of second degree burglary and two counts of receiving stolen property. Appellant was sentenced to state prison for a term of five years and eight months.

Appellant thereafter timely pursued an appeal to the Court of Appeal for the Second District of California for review of the denial of the motion to suppress under California Penal Code section 1538.5. The appeal was consolidated with that of his wife, Lisa Bullwinkle. The judgment was affirmed on appeal in a decision filed April 24, 1980. Appellant's petition for rehearing was denied, and a petition for hearing was denied by the Supreme Court of California on June 25, 1980.

This appeal is taken from the

judgment of the Court of Appeal for the Second Appellate District of California. The appeal of codefendant Lisa Bullwinkle has previously been docketed (No. 80-5263).

B. The Facts Relating to the Motion to Suppress

Santa Barbara Police Officers Ira Watson and John Alpert went to an apartment in Santa Barbara on March 3, 1978, with arrest warrants for appellant Edward Bullwinkle and his wife, Lisa Bullwinkle, for writing checks without sufficient funds. The officers were admitted into the apartment and placed appellant and his wife under arrest in the living room. Codefendant Lisa Bullwinkle indicated a desire to go upstairs to change her clothes. She went upstairs to a bedroom, and when Detective Watson heard a door close, he followed

her upstairs. Detective Alpert and appellant joined codefendant Lisa Bullwinkle and Detective Watson in the bedroom.

Detective Alpert asked codefendant Bullwinkle if she wished to take her purse, indicating a leather bag on the floor. She said the bag was not a purse, but instead was a camera case. Codefendant Bullwinkle picked up another bag, her purse, from the floor, and Detective Watson immediately seized it and handed it to Detective Alpert.

Detective Alpert looked in the purse for weapons before appellant and his wife were transported to the police station. Inside the purse he observed only checkbooks. Upon arriving at the police station, Detective Alpert emptied the contents of the purse on his desk, looking for evidence such as checks

relating to the charged offense or other offenses.

As Detective Alpert examined the contents of the purse, Detective William Rogers passed by and noticed a photograph of appellant, which he felt resembled an artist's drawing of a suspect in a burglary of a camera store. Detective Rogers compared a list of camera serial numbers found in codefendant Bullwinkle's purse with items stolen in the burglary, and based upon this information, obtained a search warrant for the residence of appellant and his wife. Evidence discovered in that search led to the filing of the burglary and receiving stolen property charges.

II

ARGUMENT

THE CASE WAS NOT DOCKETED IN A TIMELY FASHION AND FURTHER FAILS TO PRESENT A SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. The Jurisdictional Statement Was Not Timely Filed

By statute and rule of court, a jurisdictional statement must be filed not more than 90 days after entry of the judgment appealed from. (28 U.S.C. 2101(c); Rule 12.1, Rules of the Supreme Court of the United States.) Because appellant failed to file his jurisdictional statement within 90 days of the judgment, this appeal should be dismissed.

Following conviction, appellant took an appeal to the California Court of Appeal, which affirmed the judgment on April 24, 1980. (See Appellant's Supp. Appx., p. 3.) Appellant filed a timely

petition for hearing in the California Supreme Court, which was denied on June 25, 1980. (Appellant's Supp. Appx., p. 22.) Upon denial of hearing in the California Supreme Court, the judgment of the California Court of Appeal became final and the 90-day period for filing of the jurisdictional statement commenced. (See Market Street R. Co. v. Comm'n. (1945) 324 U.S. 548, 552-553, 89 L.Ed. 1171, 65 S.Ct. 773.) Computing the 90-day period from June 25, 1980, as required by Rule 29.1, results in the 90th day falling on September 23, 1980. The jurisdictional statement, which was docketed on September 26, 1980, was therefore untimely.

The failure to file a timely jurisdictional statement has been viewed as the basis for dismissal in this Court. (Hutter et ux. v. Korzen (1972)

409 U.S. 905, 34 L.Ed.2d 166, 93 S.Ct. 216 [14 days late]; Shapiro v. Doe (1970) 396 U.S. 488, 24 L.Ed.2d 677, 90 S.Ct. 641 [2 days late].) While it is true the defect "is not jurisdictional" (Johnson v. Florida (1968) 391 U.S. 596, 598, fn. 1, 20 L.Ed.2d 838, 88 S.Ct. 1713), no excuse has been tendered for the late docketing of the appeal, and appellee strongly urges this Court to dismiss the appeal for failure to comply with Rule 12.1. (Pittsburgh Tow Co. v. Mississippi Barge Line (1966) 385 U.S. 32, 32-33, 17 L.Ed.2d 31, 87 S.Ct. 195.)

B. Appellant Has No Expectation of Privacy in His Wife's Purse

The instant case involves the propriety of a search of a purse belonging to appellant's wife, codefendant Lisa Bullwinkle. In California, appellant was not required to establish or show that he

had an expectation of privacy in his wife's purse in order to challenge the search of the purse under the state's vicarious exclusionary rule. (See Kaplan v. Superior Court (1971) 6 Cal.3d 150, 156-161, 98 Cal.Rptr. 649, 491 P.2d 1; People v. Martin (1955) 45 Cal.2d 755, 759-761, 290 P.2d 855.) It is clear, however, that appellant had no expectation of privacy in the purse and may not challenge the search in this Court. The judgment should therefore be affirmed.

Last term in Rawlings v. Kentucky (1980) ___ U.S. ___, 65 L.Ed.2d 633, 641, 100 S.Ct. ___, this Court reaffirmed the principle that a defendant may not challenge the search of the purse of a third party unless he has an expectation of privacy in the purse. (See also Rakas v. Illinois (1978) 439 U.S.

128, 140, 58 L.Ed.2d 387, 99 S.Ct. 421.) Moreover, it was held in Rawlings that the defendant's ownership of property seized from a third person's purse is insufficient to establish an expectation of privacy to challenge the search since "'archane'" concepts of property law do not control the ability to claim the protections of the Fourth Amendment. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 642; see also United States v. Salvucci (1980) ___ U.S. ___, 65 L.Ed.2d 619, 628, 100 S.Ct. ___; Rakas v. Illinois, supra, 439 U.S. at pp. 149-150, fn. 17.) It is, of course, appellant's "burden of proving not only that the search [of his wife's] purse was illegal, but also that he had a legitimate expectation of privacy in that purse." (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 641.)

Despite the clear holdings of this Court that concepts of property law do not control one's ability to challenge a search under the Fourth Amendment, appellant nonetheless commences his argument by contending that his interest in his wife's purse under California community property law establishes his right to challenge the search. (Jur. Stmt., pp. 24-26.) Because the purse is presumptively community property under California law, appellant reasons he was a co-owner of the purse and who could challenge its search.

Appellant's contention ignores the settled state of the law as well as the precise holding in Rawlings v. Kentucky, supra. As noted above, principles of property law do not establish a defendant's expectation of privacy for purposes of the Fourth Amendment.

(Rakas v. Illinois, supra, 439 U.S. at pp. 149-150, fn. 17.) Indeed, application of the abstract principles of California's community law provide no analytical assistance in determining if appellant had an expectation of privacy in his wife's purse. Appellant's position amounts to the type of artificial device founded upon state property law which this Court has refused to adopt as a basis for asserting a reasonable expectation of privacy.

Indeed, appellant's position is far weaker than that of the defendant in Rawlings v. Kentucky, supra, in which narcotics belonging to the defendant were seized from the purse of a woman present at the time of the arrest. The defendant in Rawlings claimed that ownership of the narcotic substances created an expectation of privacy which justified his

Fourth Amendment challenge to the search of the purse. The contention was rejected on the basis his ownership of the drugs, and concepts of property law do not establish an expectation of privacy in the purse. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 642.)

If a defendant's actual ownership of the contents seized from another's purse does not establish a reasonable expectation of privacy under Rawlings, it is readily apparent that appellant's position that artificial concepts of California community property law created an expectation of privacy in his wife's purse is devoid of merit. Consistent with this Court's repeated pronouncements, appellant cannot contrive a reasonable expectation of privacy based only upon the California property law. (Rawlings v. Kentucky, supra, 65 L.Ed.2d

at p. 642; Rakas v. Illinois, supra, 439 U.S. at p. 149, fn. 17.)

In addition to relying upon his alleged community property interest in codefendant Lisa Bullwinkle's purse, appellant further argues that he had a reasonable expectation of privacy in the purse because it contained his passport. Appellant reasons that the instant case is distinguishable from Rawlings v. Kentucky, supra, because: (1) the purse belonged to appellant's wife rather than an acquaintance; (2) the purse "appears to have been the regular depositing site for the passports of both spouses"; (3) appellant had a right to exert dominion and control over the purse; (4) the purse was a secure place to keep the passport; and (5) there are no facts to show that appellant did not believe his wife's purse was secure from governmental

intrusion. (Jur. Stmt., pp. 26-28.)

As noted above, it was appellant's burden to establish that he had a reasonable expectation of privacy in his wife's purse under the Fourth Amendment as a condition to his challenge of the search of the purse. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 641; Rakas v. Illinois, supra, 439 U.S. at p. 131, fn. 1.) Despite this obligation, appellant presented no evidence on the issue in state court, and his asserted expectation of privacy in this Court is both legally and factually inadequate to show a violation of appellant's Fourth Amendment rights.

Contrary to appellant's argument, a purse would normally create an expectation of privacy only in the person to whom it belongs. A purse is a uniquely personal item of property, and

not one in which a third person would have an expectation of privacy absent some strong factual showing. Having made no such showing whatever of an expectation of privacy in the trial court, appellant has not satisfied his burden of establishing his ability to raise the Fourth Amendment contention.

An examination of the factors relied upon by appellant demonstrates the inadequacy of his argument. The fact that the purse belonged to appellant's wife, rather than an acquaintance as in Rawlings, says absolutely nothing about appellant's purported expectation of privacy in this item of personal property. Appellant has established only that his wife owned a purse, but has failed to present evidence that he had a privacy interest in the purse. Appellant's statement that the purse appears to have

been the "regular depository site for the passports of both spouses" is totally devoid of evidentiary support in the record. Appellant cannot point to any evidence to support the statement that the purse was a "regular depository site" for any passport. Moreover, there is no evidence appellant even knew his passport was in his wife's purse.

Equally without evidentiary support is appellant's assertion that he had a right to exert dominion and control over the purse. The record is devoid of any evidence that appellant had any right to control his wife's purse. Similarly, appellant's argument that the purse was a secure place to keep the passport provides no assistance in establishing appellant's expectation of privacy in his wife's purse in view of the absence of evidence to establish how the passport

got into the purse. The record fails to establish that appellant had knowledge of the passport's presence in the purse. Finally, while there may not be facts to show that appellant did not believe that his wife's purse was secure from governmental intrusion, the burden was on appellant to affirmatively "establish an objectively reasonable expectation of privacy." (See Rakas v. Illinois, supra, 439 U.S. at p. 143, fn. 12.) The absence of evidence on the point establishes only that appellant failed to sustain his burden of showing that the search involved an item in which he had a reasonable expectation of privacy.

In view of appellant's wholly inadequate showing to support a finding that he had an expectation of privacy in his wife's purse, he may not assert a violation under the Fourth Amendment.

"Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (Alderman v. United States (1969) 394 U.S. 165, 174, 22 L.Ed.2d 176, 89 S.Ct. 961.) Appellant's lack of an expectation of privacy in his wife's purse is manifest from this Court's opinions, and accordingly the instant case fails to present a substantial federal question requiring further consideration.

C. The Arguments Purportedly Incorporated by Reference From the Jurisdictional Statement of Codefendant Lisa Bullwinkle Are Not Properly Raised in This Court

Having utilized 28 pages in his jurisdictional statement without discussing the merits of the search issue, appellant purports to incorporate by reference three additional substantive

arguments from the jurisdictional statement of codefendant Lisa Bullwinkle in case No. 80-5263. (See Appellant's Jur. Stmt., pp. 28-29.) Appellee submits that the incorporation by reference is not authorized by court rules and accordingly appellant failed to properly raise the substantive search issues he purports to incorporate.

Appellant relies on Rule 15.3 to justify incorporating by reference from the jurisdictional statement of codefendant Lisa Bullwinkle. Rule 15.3 provides as follows:

> "The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendices."

It is apparent from the clear language of Rule 15.3 that the rule does not in any way authorize incorporation by reference. Appellee is aware of no other rule which might authorize incorporation by reference.

Appellant has therefore apparently attempted to circumvent the 30-page limitation on jurisdictional statements by incorporating some 16 pages of argument from the jurisdictional statement of codefendant Lisa Bullwinkle, in addition to the 30 pages of appellant's own jurisdictional statement. Rule 15.3 is clear that the jurisdictional statement shall not exceed 30 pages. Because appellant's attempt to incorporate by reference is not authorized, is contrary to Rule 15.3, and raises issues which appellee could not possibly respond to in the 30 pages

allowed for this motion under Rule 16.3, appellee submits that issues III through V are not properly raised before this Court.

CONCLUSION

For the foregoing reasons, appellee moves that the appeal be dismissed, or in the alternative, that the judgment be affirmed for failure to raise a substantial federal question.

Respectfully submitted,

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80-5456

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IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

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EDWARD JOHN BULLWINKLE, III)
)
Appellant,)
v.)
)
PEOPLE OF THE STATE OF CALIFORNIA,)
)
Appellee.)

On Appeal from the Court of Appeal

for the Second Appellate District of California

Reply

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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FEDERAL RULES OF APPELLATE PROCEDURE

28 (i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

1 (a) Scope of rules. These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

NO. 80-5426

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

EDWARD JOHN BULLWINKLE, III,
Appellant,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

APPELLANT HAS A REASONABLE EXPECTATION OF PRIVACY IN HIS WIFE'S PURSE

This Court held in Rawlings v. Kentucky (1980) _____U.S._____, 65 L.Ed.2d 633, 100 S.Ct.____, that "arcane" concepts of property law ought not to control the ability to claim the protections of the Fourth Amendment. Nevertheless, as Mr. Justice Blackmun points out in his concurring opinion, not every concept of ownership or possession is "arcane" and, in some circumstances, property interests may be considered weighty factors in establishing a reasonable expectation of privacy under the Fourth Amendment. In rejecting some property concepts the Court has not altogether abandoned the use of others in determining the presence or absence of the privacy

interests protected by the Fourth Amendment. [Rakas v. Illinois (1978) 439 U.S. 128, 58 L.Ed.2d 387, 401 (footnote 12), 99 S.Ct. 421]

California's Community Property laws are of particular relevance in a discussion of whether or not Mr. Bullwinkle had a legitimate expectation of privacy in his wife's purse. It is, of course, necessary for him to extablish this point in order to be able to join his wife Lisa in attacking the illegal search and seizure.

Unlike the arcane distinctions between quests and licensees that this Court refused to apply in Rakas v. Illinois, supra at p.401, the community property laws of California have been frequently changed by amendments to the Civil Code. They do not exist only "in the desiccated atmosphere of ancient maxims and dusty books."[Rawlings v. Kentucky, supra at p.647]

These modern concepts of marital property rights are important considerations in a determination of the rights and legitimate expectations of either spouse concerning their community property. Furthermore, these concepts are evidence of the "understandings that are recognized and permitted by society" that this Court has considered significant in discussion of the legitimacy of an appellant's expectation of privacy. [Rakas v. Illinois, supra]

Appellee argues that Mr. Bullwinkle's position is weaker than that of the defendant in Rawlings. On the contrary, appellant's position is much stronger. Mr. Bullwinkle, like Mr. Rawlings, owned the property found in the purse, in this case the passport. In addition, Mr. Bullwinkle, unlike Mr. Rawlings, had a community property interest in the purse. Because both husband and wife have dominion and control over

community property and because both spouses were using the purse, to hold their valuables, both Lisa and Edward Bullwinkle had a reasonable expectation that their valuables were safe from governmental intrusion.

Appellee also argues that a "purse" normally creates an expectation of privacy only in the person to whom it belongs. This is similar to the argument rejected in Jones v. United States (1960) 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725. It is more likely that the expectation of privacy is in the one who uses the "purse", just as the defendant in Jones had a legitimate privacy interest in the premises he was using. The facts here indicate that both spouses were using the "purse" to hold their valuables. The presence of Mr. Bullwinkle's passport in what has been called his wife's "purse" is prima facie evidence of the fact that he had an objectively reasonable expectation of privacy in that "purse". This evidence is sufficient to meet appellant's burden of proof.

Appellee's analysis of Mr. Bullwinkle's expectation of privacy in the "purse" stems from a sexual stereotyping that is inapplicable and impermissible in a discussion of constitutional rights. If the "purse" had been called by another name, i.e. a piece of luggage, and was used by both husband and wife as a depository for their personal belongings, there would be no doubt that Mr. Bullwinkle had an expectation of privacy in that piece of luggage regardless of who normally carried it, or what the item was otherwise called.

Because the item is called a "purse" rather than a "suitcase", appellee finds it difficult to accept that appellant, a man, could have a reasonable expectation of privacy in an item traditionally considered belonging to a woman. There are two important points to be considered with regard to this problem:

1) The changing fashions in today's society no longer preclude a man from owning or using a "purse" to carry toiletries and items of personal identification. Modern fashions make it difficult for men to carry identification or other items in the pockets of tight fitting pants or in jackets or shirts which may not have pockets or at best have only small ones. As a result, it is not unusual for men to be seen carrying leather bags similar to a "purse". 2) Lisa Bullwinkle's "purse" is a closed container and should be considered in such neutral terms for the purpose of discussing the constitutional issues in this case.

The expectation of privacy of appellant, husband, in a closed container owned by and used by both spouses is relevant to the issues in this case; the believability of a man, husband's expectation of privacy in a woman, wife's "purse" is not an accurate way to phrase the issue. The sexual connotations surrounding the term "purse" should not be a factor in the discussion of Mr. Bullwinkle's expectation of privacy. The issues in this case concern a closed container used as a depository by both spouses for items of identification, checkbooks and other valuables. Both appellant and his wife had a legitimate expectation of privacy in the closed container jointly used by them.

Contrary to appellee's argument the evidence is sufficient to support a finding that appellant had a reasonable expectation of privacy in his wife's "purse".

In additon, there is a serious question of modern property rights as an indication of an individual's expectation of privacy under the Fourth Amendment. The issues presented are substantial and require further consideration and clarification by this Court.

II

TIMELINESS DEFECT IS NOT JURISDICTIONAL

Timely docketing of a Jurisdictional Statement is not a jurisdictional requisite. [Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 445, 38 L.Ed.635, 640, 94 S.Ct.656 (1974); Johnson v. Florida 391 U.S. 596, 598, 20 L.Ed.2d 838, 99 S.Ct. 1713 (1968)] The court has not always enforced the provisions of its Rule 12(1) and has allowed appeals despite untimely doceting. [Communist Party of Indiana v. Whitcomb, supra; Johnson v. Florida, supra (56 days late); United Public Workers of America v Mitchell, 330 U.S. 75; 91 L.Ed. 754, 756, 67 S.Ct. 556]

In this instance the Jurisdictional Statement was filed three days late due to a mistake in calculation of the time period by counsel's office and an apparent misinterpretation of a telephone conversation with the Court's clerk in charge of docketing, Mr. Ed. Schate. (Please see attached declaration of M. Margaret Blanchard.) The mistake was unintentional and once discovered, a good faith effort was made to deliver the statement as soon as possible.

Unlike Pittsburgh Towing Co. v Mississippi Barge Line, 385 U.S. 32, 17 L.Ed.2d 31, 87 S.Ct. 195 which appellee cites in support of its motion to dismiss for untimeliness, this is not an example of a lengthy delay by counsel apparently unaccompanied by any effort to contact the Court regarding the delay. On the contrary, appellant's counsel honestly believed the statement would be filed on time and when that did not appear to be possible, the Court's clerk in charge of docketing was contacted.

This is a criminal case where appellant is being deprived of his liberty as a result of a violation of his Fourth Amendment rights. The Court has indicated in past decisions an apparent willingness to relax its own rules in criminal cases where the ends of justice so require. [Schacht v. United States (1970) 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555; Durham v. United States (1971) 401 U.S. 491, 28 L.Ed. 2d 200, 91 S.Ct. 858; Taglianetti v. United States (1969) 394 U.S. 316, 22 L.Ed.2d 302, 89 S.Ct. 1099]

Since appellee has not alleged any injury by appellants inadvertent delay and the issues presented in this appeal are substantial, appellant requests that the court exercise its discretion to forgive appellant's mistake and deny the motion to dismiss.

III

ISSUES II THROUGH IV OF APPELLANT'S JURISDICTIONAL STATEMENT HAVE BEEN PROPERLY RAISED.

"Parties interested jointly, severally, or otherwise in a judgement may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues." Rule 10(6)

Issues II - IV in appellant's Jurisdictional Statement, pp.2-4, are identical to questions I - III in the Jurisdictional Statement of Lisa Bullwinkle, Docket #80-5263. Appellant Edward John Bullwinkle, in the interest of brevity

and to prevent needless repetition, joins in that Jurisdictional Statement pursuant to Rule 10(6).

In an effort to clarify the single issue not shared by the two cases, appellant filed his own Jurisdictional Statement so that all issues properly before this Court may be raised.

There has been no attempt by appellant to circumvent the thirty (30) page limitation in Rule 15(3). Appellant believes his Jurisdictional Statement is proper although it is admitted that the authority for incorporating questions and arguments in Lisa Bullwinkle's Jurisdictional Statment is Rule 10(6) and not 15(3) as previously quoted.

Although appellee is unable to find any authority for the incorporation by reference appellant finds Federal Rule of Appellate Procedure 28(i) applicable here. The rule allows any appellant or appellee in a case involving more than one appellant or appellee to adopt by reference any part of the brief of another as well as allowing them to join in a single brief.

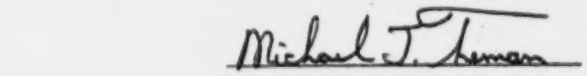
The Rules of Appellate Procedure govern procedure in appeals to United States courts of appeals in applications for writs or other relief which a court of appeals is competent to give. [FRAP 1(a)] Since the United States Supreme Court is the highest court of appeal in the nation and because FRAP 28(i) is not in direct conflict with any United States Supreme Court rule it is appellant's belief that issues II through IV of its Jurisdictional Statment have properly raised questions of substantial constitutional importance through incorporation by reference.

CONCLUSION

Appellee State of California has failed to present any significant argument in support of its motion to dismiss or affirm that would outweigh the substantiality of the questions presented by this appeal. Appellant respectfully urges the Court to overrule the Motion to Dismiss or Affirm and to place the argument on its calendar.

DATED: November 3, 1980

Respectfully submitted,



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IN THE

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EDWARD JOHN BULLWINKLE, III,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

CERTIFICATE OF SERVICE

Undersigned, a member in good standing of the bars of California and the Supreme Court of the United States, hereby certifies that service of Appellant's Brief in Opposition to Motion to Dismiss has been made, pursuant to rule 28.3, on all parties required to be served, through their counsel, this 4th day of November, 1980, by placing copies thereof in the United States mail, first class postage pre-paid, addressed to:

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DATED: November 4, 1980

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